

STATE OF NEW YORK
CITY OF ROCHESTER

COUNTY OF MONROE
CITY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

CROSS MOTION
AND
MEMORANDUM

NIKKI G. CRAFT, KATHLEEN F. REILLY,
DEBORAH A. SEYMOUR, ELISE JO TOOLEY,
LYNN E. ZICARI, RAMONA SANTORELLI,
AND MARY LOU SCHLOSS,

Defendants.

THOMAS J. BRILBECK, affirms and states that he is an Assistant District Attorney in and for the County of Monroe, State of New York, and as such submits this cross-motion and memorandum in response to defendants' motion and memorandum.

1. I am an Assistant District Attorney for the County of Monroe presently assigned responsibility for the prosecution of this case.

2. I deny each, every, any and all factual allegations contained in defense papers not specifically conceded.

3. I oppose each request for relief not specifically conceded.

STATEMENT OF FACTS

On or about June 21, 1986, the defendants, all females, removed their shirts in Cobbs Hill Park, Rochester, New York, exposing their breasts. Prior to the incident, representatives of the women apprised the Rochester Police Department of their

intent to protest New York law prohibiting exposure of woman's breasts in a public place. Cobbs Hill Park is a park open to the public and operated by the City of Rochester.

The women were arrested and charged with violating Section 245.01 of the Penal Law (Exposure of a Person), and issued appearance tickets to appear in Rochester City Court for arraignment.

Pre-trial motions were filed by the defendants challenging the constitutionality of Section 245.01.

The Honorable Herman J. Walz, reserved decision on the motions and presided over a trial of the facts.

The People deny each and every allegation contained within the defendants' motion papers, and respectfully request the Court to deny their motion in all respects.

CROSS-MOTION

1. The People respectfully move this Court to preclude defendants from making reference to, or incorporating within their memorandum of law, any evidence or testimony presented at the trial held September 15-18, 1986.

2. Defendants' motions, by their very nature, are pre-trial motions, as they attack the accusatory instruments on their face and allege insufficiency and defectiveness of the informations.

3. An information must be sufficient alone, without resort to testimony or record of evidence, in order to withstand a motion to dismiss for insufficiency. People v. Crisofulli, 91 Misc. 2d 424 (1977).

4. To permit reference to this prior testimony or evidence would interfere with the Court's province as trier of the facts and trier of the law.

5. To permit reference to this prior testimony or evidence would unduly prejudice the People.

MEMORANDUM

EQUAL PROTECTION

The issue presented is whether Section 245.01 violates equal protection under either the Federal or State constitutions as it restricts females, but not males, from appearing topless in public. Section 245.01 does not violate equal protection.

Section 245.01 provides that:

A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this Section, the private or intimate parts of a female shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.

The function of the Equal Protection Clause of the Constitution is to measure the validity of classifications created by state laws. Parham v. Hughes, 99 S. Ct. 1742,

1749, 441 U.S. 347, 60 L. Ed. 2d 269 (1979). When dealing with statutes which establish classifications based on sex, the statute, to withstand muster, "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 97 S. Ct. 451, 457, 429 U.S. 190, 50 L. Ed. 2d 397 (1976), People v. Liberta, 64 N.Y. 2d 152 (1984).

Section 245.01 clearly reflects the society or community standard that the female breast be considered a sexual or intimate part of the body. See Penal Law Sections 235.20 (2) (3). This can best be seen in opinions attempting to define "sexual" or "intimate" parts of a person's body. See Practice Commentary, McKinney's, Book 39, Penal Law Section 130.00, page 447,; People v. Teisher, 73 AD 2d 136, 145 (1st Dept. 1980); People v. Lewis, 112 AD 2d 702 (4th Dept. 1985); People v. Thomas, 91 Misc. 2d 724, 727 (1977); People v. Kittles, 102 Misc. 2d 224, 225 (1979); and People v. Victor P., 120 Misc. 2d 770, 772-73 (1983).

While the physical differences between men and women must never become a pretext for invidious discrimination, they cannot be totally disregarded in a statutory scheme. Michael M. v. Superior Court of Sonoma County, 101 S. Ct. 1200, 450 U.S. 464, 67 L. Ed. 2d 437 (1981). "In short, the Equal Protection Clause does not mean that the physiological

difference between men and women must be disregarded...The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist." Id. 101 S. Ct. at 1210-11 (Stewart, concurring).

In People v. Gilbert, 72 Misc. 2d 795 (1973) the Court upheld the constitutionality of Section 245.01 as it related to exposure of a woman's breasts and equal protection considerations. In People v. Gilmore, 120 Misc. 2d 741 (1983), by interpreting Section 245.02 (promoting exposure of a female), the Court dismissed arguments claiming that law violated equal protection stating:

The fact that Section 245.02 of the Penal Law relates solely to the improper exposure of females does not thereby render the statute as violative of the equal protection clause of our Constitution. To constitute a denial of equal protection there must be an arbitrary systematic course of discrimination, purposely designed to favor one person or class over another, with no rational basis for the distinctions. Legislative distinctions will be upheld if they can reasonably be sustained.

120 Misc. 2d at 247.

The primary function of Section 245.01 is to permit the government the ability to regulate the unfettered use of public areas (parks, beaches, etc.) by the community at large. It goes without question that an important governmental objective is to provide recreational and public access areas for all the community to enjoy; to serve this objective the government has the legitimate right to restrict women from exposing their breasts in these areas.

In People v. Price, 33 N.Y. 2d 831 (1973) the Court discussed Section 245.01 as follows:

Legislation may not control the manner of dress, absent commercial exploitation of exposure, or absent conduct or dress under circumstances creating or likely to create public disorder.

(Emphasis added.)

In discussing the newly amended Section 245.01, Governor Cuomo stated:

I am aware there are parents and children who use public beaches as their major summer recreational experience. This law will protect them from the discomfort caused by unwelcome public nudity.

Memorandum in support of Section 245.01 (1984).

Other jurisdictions have focused upon exposure statutes and governmental objectives in enacting such statutes. In State v. Crenshaw, 597 P. 2d 13 (Haw. 1979), the Hawaii Supreme Court, while holding nude sunbathing was not "lewd" conduct under the statute, stated "whether such exposure per se ought to be proscribed must necessarily be addressed to the wisdom of the legislature." 597 P. 2d at 14.

In Yauch v. State, 505 P. 2d 1066, rev'd. on other grounds 514 P. 2d 709 (Ariz. 1973), the Arizona Supreme Court stated:

It cannot be seriously doubted that the state has a legitimate interest in regulating nudity in certain contexts. In the privacy of the home nudity is not a legitimate object of state interest. But on a crowded street, nudity, albeit exercised without a scintilla of lewd intent, is a matter of some governmental concern. It may constitute a threat to the maintenance of the public peace...."

505 P. 2d at 1072.

In Eckl v. Davis, 51 Cal. App. 3rd 831, 124 Cal. Rptr. 685 (1975), the Court held valid a Los Angeles ordinance prohibiting nudity and topless sunbathing in Los Angeles parks and beaches. The stated intent of the ordinance was to permit use of these areas by all the public and prevent interference of that right. The Court held:

Nature, not the legislative body, created the distinction between that portion of a woman's body and that portion of man's torso. Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the covering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include express reference to that area of the body. The classification is reasonable, not arbitrary, and rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike. (See Reed v. Reed, 404 U.S. 71, 75-76). No Constitutionally improper classification is involved.

51 Cal. App. 3rd at 847-848.

In short, Section 245.01 does not violate the Equal Protection Clause of our Constitution. While the law prohibits only females, and not males from exposing their breasts in public areas, it does so with the understanding that our community and our courts continue to define female breasts as sexual or intimate parts of a person's body. Consequently, the State has the legitimate right to restrict exposure of a woman's breasts in a public area.

Freedom of Speech and Expression

The issue presented is whether Section 245.01 violates the defendants' rights to freedom of speech and expression under the First and Fourteenth Amendments to the United States Constitution. Section 245.01, as written, or as applied to the defendants, does not violate these rights.

The protective rights of the First and Fourteenth Amendments, when outside the scope of actual spoken or written words, are more amenable to State regulatory powers. People v. Karns, 81 Misc. 2d 186, 192 (Rochester City Court, 1975). "But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." California v. LaRue, 409 U.S. 109, 117. (1972)

In United States v. O'Brien, 391 U.S. 367 (1968) the Court established a four-pronged test to determine whether conduct falls within First Amendment protection:

Whatever impression inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-377.

In People v. Hollman, _____ Misc. 2d _____ (App. Term, 1986), the Court confronted the question of whether Section 245.01, as applied to male sunbathers, violated their First Amendment Right to freedom of speech, as well as other constitutional rights. The Court held that such rights are not violated by the law, stating, "Clearly, defendant's nude sunbathing is not a form of communication to an 'observer' that is entitled to constitutional protection." _____ Misc. 2d at _____.

See also Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) ("No one would suggest that the First Amendment permits nudity in public places," Justice Douglas, dissent); and Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268 (1975) (footnote 7).

The question has been addressed in other jurisdictions. Yauch v. State, 505 P. 2d 1066, rev'd on other grounds, 514 P. 2d 709 (Ariz. 1973) ("Nudity per se is not protected by the First Amendment," 505 P. 2d at 1072); Chapin v. Town of Southampton, 457 F. Supp. 1173 (E.D. N.Y. 1978) ("Nudity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection," 457 F. Supp. at 1174); City of Daytona Beach v. Percio, 476 So. 2d 197 (Fla. 1985) (no First Amendment implication in ordinance governing nudity of bar employees).

In the present case, defendants argue their conduct (removing their shirts and baring their breasts) is protected

speech activity. However, the defendants' actions are not protected speech as defined in the O'Brien formula:

1. It is within the constitutional power of the state to regulate its parks and public areas.

2. It is an important governmental interest to regulate the parks and public areas and to protect the patrons of these areas from viewing unwelcome public nudity.

3. The governmental interest of regulating its parks and public areas are unrelated to any suppression of free expression (parade and demonstration permits remain available; speechmaking is not suppressed).

4. Any incidental restriction on First Amendment activity is outweighed by the furtherance of the governmental interest.

Consequently, Section 245.01 does not violate protections of freedom of speech and expression. The conduct of the defendants' does not fall within protected speech. Even when coupled with their "protest", their conduct does not rise to the level to overcome the O'Brien criteria. The defendants had free access to media prior to, during, and after their arrests to express their views. There has been no suppression of speech, either in fact or in law.

Overbreadth

Defendants contend Section 245.01 violates their rights to freedom of speech and expression in that the statute should

be declared void for overbreadth. The statute, as written and applied, is not overbroad.

Section 245.01, by excluding nudity involved in or related to plays, exhibitions, shows, or entertainment, in effect is protecting conduct previously defined as protected speech. As a result, persons involved in these activities are on reasonable notice their actions shall be protected from prosecution under this statute. See People v. Hollman, _____ M 2d _____ (App. Term 1986).

Vagueness

Defendants contend Section 245.01 is unconstitutional for being overly vague. Section 245.01 is not vague, and in fact places all on reasonable notice as to whether their conduct is violative of the statute.

In People v. Harris, 129 Misc. 2d 577 (1985), Section 245.01 was attacked by the defendant as being unconstitutionally vague. In holding the statute was not vague as applied to that defendant, the Court stated:

The test of a statute's vagueness for due process purposes is to be made with respect to the actual conduct of the actor who attacks the statute and not with respect to hypothetical situations at the periphery of the statute's scope or with respect to the conduct of other parties who might not be forewarned by the broad language.

129 Misc. 2d at 578.

Defendants, quite hypothetically, question whether they or other potential defendants are on adequate notice as to the definition of a "public place". Section 240.00 (1) defines "public place" as follows:

"Public place" means a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

The above language, coupled with the language of Section 245.01, clearly placed the defendants on notice that their conduct (baring their breasts in Cobbs Hill Park) would violate the Penal Law. "The Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices....'" Roth v. United States, 354 U.S. 476, 491 (1957), citing United States v. Petrillo, 332 U.S. 1.

For the foregoing reasons, the People maintain the defendants were placed on adequate notice their conduct violated Section 245.01, and that as a result the statute should not be declared void for vagueness.

Ninth Amendments Consideration

The issue is whether Section 245.01 violates the defendants' rights as protected under the Ninth Amendment

of the United States Constitution. Section 245.01 is not violative of the Ninth Amendment in any manner.

The Ninth Amendment standing alone houses no constitutional guarantees of freedom. Metz v. McKinley, 583 F. Supp. 683, aff'd. 747 F. 2d 709 (D.C. Ga. 1984). The Supreme Court has never held that any specific right is protected by this amendment. Quilici v. Village of Morton Grove, 695 F. 2d 261 (7th Cir. 1982), cert. den. _____ U.S. _____ 104 S. Ct. 194.

The Ninth Amendment has been utilized generally by the Court to identify the fundamental right to privacy. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973). The present case does not involve any right to privacy. In fact it has been held that "the right to privacy is essentially the right to be left alone...and does not create a right to impose one's lifestyle on others who have an equal right to be left alone." People v. Hollman, _____ Misc. 2d _____ (App. Term 1986) as quoting Chapin v. Town of Southampton, 457 F. Supp. 1173, 1175 (E.D. N.Y. 1978).

It has been held the Ninth Amendment does not protect a right of freedom of appearance. Rendley v. Mingus Union High School District No. 4 of Yavapai County, 504 P. 2d 919 (Ariz. 1972). A county may go so far as to regulate

"provocative" dress in massage parlors. Harper v. Lindsay, 454 F. Supp. 597 (S. D. Tex. 1978).

Consequently, defendants' conduct has failed to rise to the level of a fundamental right protected by the Ninth Amendment. The Ninth Amendment has been used sparingly to protect such unenumerated rights. The "right" to appear in public with breasts exposed is conduct which simply fails to fall within Ninth Amendment protections.

CONCLUSION

The question of unconstitutionality of a statute, once raised, must be proven beyond a reasonable doubt. People v. Karns, 81 Misc. 2d 186, 199 (Rochester City Court, 1975). See also Matter of Van Berkel v. Power, 16 N.Y. 2d 37, 40 (1965); People v. Pagnotta, 25 N.Y. 2d 333 (1969). The general principle is that a law is to be declared unconstitutional only as a last resort. Matter of Roosevelt Raceway v. Monaghan, 9 N.Y. 2d 293 (1961). Questions as to wisdom, need or appropriateness are for the Legislature. Olson v. Nebraska, 313 U.S. 236, 246.

The defendants have failed to prove beyond a reasonable doubt the unconstitutionality of Section 245.01. While they clearly possess strong feelings and opinions that Section 245.01 violates their concept of "freedom", they fail to show beyond a reasonable doubt that the legislature may not regulate

whether persons shall appear clothed or unclothed in public areas.

Our community standards, as reflected in our legislation and court opinions, consider the female breast as a sexual or intimate part of the human body. As such, the legislation has the right to regulate whether persons shall expose these sexual or intimate parts in public.

While Section 245.01 is not unconstitutional, the defendants reserve their right to petition the Legislature for repeal or amendment of the statute. Such amendment was successful just two years ago when the Legislature excluded breastfeeding from those circumstances which would be violative of Section 245.01.

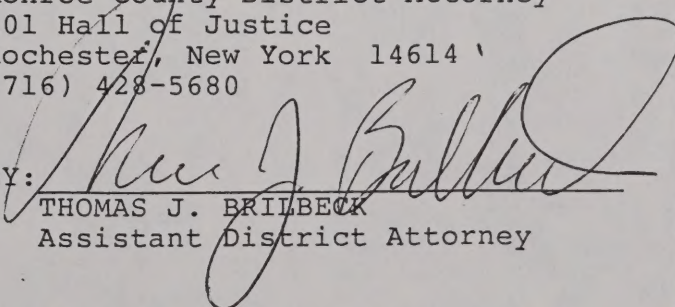
For the foregoing reasons, the People respectfully request the Court deny the defendants motions in all respects, and hold that Section 245.01, as written and as applied in the present case, is constitutional.

Dated: Rochester, New York
October 17, 1986

Respectfully submitted,

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BY:


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